IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In the matter of:	)	
	)	
GARLOCK SEALING TECHNOLOGIES, LLC, et al.,	)	No. 10-31607
	)	Jointly Administered
	)	Charlotte, NC
Debtors.	)	Jan. 9, 2012, 11:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GEORGE R. HODGES
UNITED STATES BANKRUPTCY JUDGE

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(CALL TO ORDER)

THE COURT: Good morning.

COUNSEL: Good morning.

THE COURT: Have a seat. I guess we ought to get everybody's voices on the machine. Why don't we start with Mr. Grier and go across that way?

MR. GRIER: Your Honor, Joe Grier, FCR. I think Mr. Guy's on the phone, although I am not sure.

MR. GUY: I am, Your Honor. Good morning.

THE COURT: Okay. Good.

MR. SWETT: Good morning, Your Honor. Ted Swett, Caplin & Drysdale, with Tom Moon of Moon Wright and Houston, for the committee of asbestos personal injury claimants.

MR. CASSADA: Good morning, Your Honor. I am Garland Cassada with the law firm of Robinson, Bradshaw & Hinson. I represent the debtors, and I am here today with Rich Worf and Jon Krisko of our firm. Thank you.

MR. MILLER: Good morning, Your Honor. Jack Miller of Rayburn, Cooper & Durham, on behalf of the debtors.

MR. CLODFELTER: Dan Clodfelter, Moore and Van Allen, for Coltec Industries.

THE COURT: Okay. So we have on the hearing about the hearing.

MR. SWETT: May it please the court, we are here on the committee's motion to adjust the schedule laid down by the

debtors on the motion to compel further questionnaire compliance that they have filed and noticed for hearing on January 26th, with briefs due on January 23.

The committee proposes to meet those deadlines for itself. In order to address that motion as a matter of sound case administration, we think it is ill-advised for reasons we will fully brief on the 23rd. But in the meantime, we think the court would be prudent to lift the briefing deadline and limit the scope of the hearing so as to obviate participation by individual claimants and their lawyers, who are targeted by the motion to compel, for reasons that I will develop in this argument.

In short, we think that the constituents should have no obligation to respond to the motion to compel unless and until you decide that, as a matter of sound case administration, it is necessary and appropriate to take the rather sweeping action that Garlock is proposing to take through its motion to compel; and it won't surprise you to learn that we think that doesn't make sense and we hope to persuade you on the 26th not to go there.

The debtors support their motions by some schedules, some lists of people they say failed to comply adequately with the questionnaire in one way or the other. I am going to talk a little bit about two categories, the category of persons that they say didn't return any questionnaires and the category of

persons that they say did not certify them. We believe their count on both scores is deeply flawed resulting in, without consideration of any of the other issues that we will brief on the 23rd, a very overbroad blunderbuss approach to what should be narrow and tailored, if any, compliance measures with regard to the questionnaire.

To us, this is a symptom that the debtors are overeager to pick fights with the law firms who are the mesothelioma claimants. As we will sketch out on other occasions and in other papers, the debtors seem intent on turning the exercise of measuring or estimating the aggregate asbestos liability for mesothelioma into an occasion to attack the merits of the individual claims on an individual basis in a way that we believe would destroy the purpose and efficiency of the aggregate estimation and the way that we use that term and that it is generally used in the asbestos bankruptcy case law.

And the consequences of allowing or giving debtors their discretion to go around the countryside chasing the asbestos claimants' mesothelioma claimant questionnaire respondents is to compound the expense and burden of what has already been, as we will see, a very cumbersome exercise, the costs of which are uncounted but which are undoubtedly vast.

Now, I would like to call attention to the fact that the hearing date that the debtors noticed for their motion to

compel is already chocked full with important matters for the court to hear argument on as among the estate parties. It is, we think, a very bad idea to bring into that hearing the hundreds of law firms or, at the very least, the scores of law firms – I haven't counted them – implicated by the issues the debtors have raised in their motion to compel.

We have important business to get to that day, including the debtors' motion for estimation and its theory of how that estimation should be focused and how it should proceed. When we brief that motion, you will see that we certainly agree there must be an aggregate estimation but we have profound differences that are going to bear the court's careful consideration about the nature of that process and the appropriate timetable.

The debtors have also noticed for hearing on the 26th their third effort to obtain a bar date vis-a-vis mesothelioma claimants. In this case, targeted at persons who were served with the questionnaire. Their theory there is that the court would have to impose such a bar date in order to be positioned to take enforcement measures vis-a-vis the questionnaire, making that motion somewhat at odds with the motion to compel which in effect treats the questionnaire recipients as though they were already parties and dispenses with what evidently the debtors would treat as a minor procedural impediment the fact that those people are not parties to the case, in hopes that

Your Honor will then be persuaded to give the back of the hand to some very substantial objections raised by the constituents, many of whom responded to the questionnaires subject to objections, pretty much the way the debtor has responded to each and every set of discovery that we have issued in this entire case.

And finally there is the disclosure statement hearing. I wrote to Mr. Cassada, copying the court, to advise him that we withdrew our suggestion that that not be heard that day and that it be postponed indefinitely. The legal representative wisely prevailed upon us to go forward with that, and so we are busily briefing the disclosure statement objections that are due on the 19th of January for hearing on the 26th.

All of those are very important building blocks to the administration of this case with respect to the central issue. They need the court's full attention and we don't need to have the courtroom full of individual counsel clamoring to be heard on their problems with the questionnaire or the debtor clamoring to be heard on why their feet should be held to the fire.

So our suggestion is that you let the estate parties argue threshold matters regarding the motion to compel on the same date, the January 26, or if, as well may be the case, that calendar is already overfull and time is not available that day, then we have another hearing set for February 2nd and we

can come back to do that.

But there are very good reasons to restrain the debtor from the path that it says it wants to go down in the motion to compel. The stated premises and its sense of the extent and significance of the compliance questions it raises are, we think, overblown and not well-founded, and their counts attempting to justify this motion are very far from accurate.

We were tipped to this matter by one of the committee firms called our attention to the fact that they were listed in connection with three claims on Exhibit 2 to the motion to compel and two on Exhibit 4. The ones on Exhibit 2 are those who assertedly did not respond to the questionnaire . Those on Exhibit 4 are those who assertedly did not certify their responses. All five of these allegations turned out to be wrong. This is the Simon Eddins firm as it was formerly known, now known as Simon-Greenstone. Jeffrey Simon, you will recall from last February when he took the stand and testified at one of our hearings.

According to the debtors' Exhibit 2, the Simon-Greenstone firm failed to submit questionnaires for somebody named Hall, somebody named Kundra, K-U-N-D-R-A, and somebody named Conut or Cenut. I can't read my own writing. In fact, the firm did submit a response for Mr. Hall. It forwarded Mr. Kundra's questionnaire to a law firm by the name of Early that submitted it and returned to Rust the questionnaire for Mr.

Conut because the firm did not represent that person, and called attention to these latter two matters in the letter addressed to Rust of August 11, 2011, which we will come to.

So then turning to Exhibit 4 with regard to the supposed non-certification of submitted questionnaires, we learned that the debtor was asserting that that was the case for a Mr. Dodgen and a Mr. Robovsky, again with respect to the Simon Eddins firm, as it was then known. In fact, the firm has never heard of Mr. Dodgen and so advised Rust that it was unable to complete the questionnaire for that individual and did in fact certify a questionnaire submitted by the Simon Firm for Mr. Robovsky.

The error rate with regard to that firm, in the debtors' details, was a hundred percent. This gave us some concern and caused us to dig a little deeper.

So we focused first on the certification issue, and it turned out that there were three hundred and six claimants listed on Exhibit 4 as having uncertified questionnaire responses. Two hundred and forty-seven of those had to do, it turned out, with paper submissions and the balance, on-line submissions.

We were able to cull by computer through the paper submissions which numbered two hundred and forty-seven and we learned that, of that number, a hundred and sixty-six had in fact certified the questionnaire, and I have copies of those

pages to demonstrate. I'm going to mark this as ACC 110, if I may hand it up to the court.

This represents the fruits of a computerized search of the two hundred and forty-seven paper submissions that are listed on Debtors' Exhibit 4 as uncertified and, as you will see, we have just included the certification pages which are uniformly signed, usually by the lawyers and on at least one occasion by the client.

That degree of false positives in the debtors' computation is, of course, of significant concern because it suggests that they don't yet know what they have got. And I am not faulting them for that because it turns out that working with these materials is very cumbersome, and it was only by virtue of a rather sophisticated computer program that our consultant has that we were able to do this work in the time allowed.

We were advised that, for the two hundred and forty-seven paper submissions wrongly listed in total on Debtors' Exhibit 4, there were literally tens of thousands of pages of attachments. So grasping what is in there and what it means and assessing the degree of compliance and the reasons for any gaps is a significant undertaking and the debtors have chosen to file this blunderbuss motion to compel before having reasonable command over those details.

Now the overall response rate, as we will see in a

minute, based upon current assessment which, as the last time, I must caution is an analysis liable to evolve, is by, I think their computations and ours, about sixty-eight percent if you include some five hundred and sixty responses that the debtors weren't aware of when it first raised issues concerning the degree of compliance. And that compares very favorably to the extent to which the debtors were able to dismiss claims without payment in the last five years before they came into the bankruptcy court.

We have a higher response rate from the questionnaire recipients with open mesothelioma claims than we would have expected if the prepetition zero pay rate, as I will call it, had held steady for that population that is sampled by the questionnaire.

So by our likes, that appears to be a pretty robust response but, whatever may ultimately be said about that, the fact now is that the debtors do not have a good handle on the materials that they have. They have engaged, as far as we are aware, in none of the informal consultation with their discovery targets that courts these days expect and that we go through every time we have any discovery of the debtors, sometimes at great length. And the result is a motion that, if it goes unfettered, will bestir hundreds of law firms involving thousands of claimants, many of whom it will turn out in the end have complied adequately with the questionnaire, and that

is ascertainable from the existing information. It doesn't require further queries.

Now, on stuff like certification, another point worth mentioning is that, of the online submissions that the debtors flag as uncertified, there are forty-six as they count them. The law firms for those particular claimants submitted, in total, four hundred and twenty-five online questionnaire responses. So that is just a little over ten percent that the debtors say aren't signed, and they appear to be correct about that but that implies nothing like a systematic ignoring of or flouting of the certification requirement.

You have got firms on the list who submitted fifty-four questionnaires, one of which isn't electronically signed; another thirty-four questionnaires electronically submitted, one not signed. The pattern varies but nothing emerges that suggests that the law firms are just thumbing their nose at the certification requirements. So some phone calls might well clear up that problem to the extent it is a problem but, as far as we are aware, that process hasn't gotten underway.

Now, another problem is that it turns out that the population receiving the questionnaire is overbroad by a certain light for the stated purpose of the exercise and, by that, I mean it includes a lot of people who, according to the debtors' own data, don't have mesothelioma or don't have open claims as of the petition date and, therefore, quite arguably

don't meet the criteria for needing to respond to the questionnaire.

I am handing what I have marked as ACC Exhibit 111, which is a composite of correspondence submitted by law firms who have received questionnaires for people to Rust. A glance through it will give you an idea of some of the reasons why some of the people for whom questionnaires were issued didn't return them.

Cooney and Conway – by the way, these are all firms associated with the committee in this composite exhibit. Exhibit 111.1 is a letter from Cooney and Conway of October 26 advising Rust that a couple of people for whom that firm had received questionnaires had closed cases and no pending claim against Garlock.

The Kazan McClain firm, Exhibit 111.2 listed the people for whom they were submitting completed questionnaires and supporting documentation on disks; submitted another list of people whom they were acknowledging, on the existing state of their file, lack of product identification evidence vis-à-vis Garlock; and two people for whom, in addition, they weren't submitting responses because, in the one case, the claim was resolved by Garlock in February '08 and then another resolved by Anchor back in 1995.

And we have got the Simon Firm. Here, we see by letter of August 11 in Exhibit 111.3, the Simon Firm returning

uncompleted questionnaires for Donald Conut and Ralph Dodgen because they were not counsel for those persons.

111.4 is another Simon communication – all of these are by Bradley Smith, the fellow there in charge of bankruptcy cases – noting that for Mr. Paul, Richard Paul, Rust had sent two questionnaires, each uniquely identified by a separate number, and that the firm would only be completing one of those, of course. That communication went in on October 21, 2011, and similarly, on October 24, Mr. Smith advised Rust that two claimants for whom his firm had received questionnaires were not represented in the bankruptcy by his firm and that, instead, they had forwarded those forms to the Early Lucarelli firm for submission.

We have confirmed, and I have seen and can show opposing counsel if they would like to see them, completed questionnaires with attachments for those two individuals submitted by the Early firm.

Exhibit 111.6 to eight are captioned "objections" that the Simmons firm, Simmons Browder Gianaris Angelides & Barnerd, submitted as part of their questionnaire responses. These are enclosures to the many, many questionnaires that they completed and submitted, and these objections raise such matters as the firm didn't want to be responding for people it does not represent, in Exhibit 111.6; for people who have settled their mesothelioma claims already with Garlock, as in exhibit 111.7.

And, after all, freedom from the burdens of discovery is one of the points of settlement, so it is easy to understand that objection. And, finally, they didn't want to be responding for another list of persons not represented by that firm.

Let me make sure I don't have it duplicated, that exhibit six and seven are different – I mean exhibit six and eight. Excuse me, Your Honor. (Pause) Yes, they are different.

So that gives you a flavor – now, we are aware that there was correspondence like this from law firms that are not associated with the committee. It does not appear that the debtors have taken account of any of these. We would call these, in some sense, responses. They alert Rust and the debtors to reasons why completed questionnaires would not be submitted for particular individuals, including some who are acknowledging that they presently lack product identification evidence against Garlock; some whose claims are no longer open personal injury tort or wrongful death claims but settled, contractual obligations to pay on the debtors' part, at least according to the plaintiffs, and so on.

And in connection with the settled claims, or asserted to be settled claims, the debtor has complained that they didn't submit evidence of the settlement and it has no record of it but what is lacking, at least as far as I am able to discern, is any effort by the debtors to go to their local

counsel and make serious inquiry as to whether any of the people it was called to Rust's attention as being settled claims, some of which presumably were already paid, some perhaps not. That hasn't happened. And before they go stirring the world to respond further to the questionnaire, it seems that further particulars ought to be developed on that score. If it turns out that there is some issue about whether or not claims are settled or whether or not the debtor will try to repudiate or reject executory settlements, that's a subsidiary set of issues against a targeted group of individuals who will have necessarily a process of its own and shouldn't be folded into a blunderbuss motion to compel.

I would like to finally show an exhibit which is something we put together by way of a summary to illustrate parts of moving counts of the overall response rate. I have marked this, Your Honor, as ACC 112.

This reflects that a total of five thousand, eight hundred and thirteen questionnaires were sent out to law firms. There seem to have been some duplicates, reducing the relevant total by ten. Some thirty-three seventy-nine by our count were returned in the process. The debtor may differ a little bit with us on that. I haven't attempted in connection with this emergency motion to reconcile these figures to theirs, but I do highlight in here some five hundred and sixty-eight questionnaires that evidently were submitted on disks have

still not been processed and posted to the website, as I understand it, that the experts are working with. In any event, that information doesn't appear to have been digested as the debtors' motion itself seems to acknowledge in a footnote. Leading to the conclusion that, based on this raw account, sixty-eight percent of those requested to respond have done so, and that compares to the payment rate by which, I mean, what percentage of cases resolved in 2006 to 2010 were resolved by payment as opposed to dismissal without payment in the relevant period before bankruptcy, and that turns out to have been about sixty-three point five percent according to the debtors' database.

Now, when we come to argue the motion to compel on the 26th, we will endeavor to show that that is a very healthy response rate that adequately serves any sensible purpose in connection with aggregate estimation. But passing that question, I would like to note that the actual response rate is likely to prove even higher once one takes account of the fact that many of the people requested to respond, according to the debtors' own database, don't have open claims or don't have mesothelioma claims.

Here again, I am not faulting the debtors for this count because they were permitted to serve the questionnaire seeking open mesothelioma claims as of two different dates. Their old prepetition database from June 2010 and their

updated, rolled forward database took into account additional information in May 2011. But the result was a lot of false positives and, when we talk about the goals of the questionnaire in eliciting the discovery requested from persons who in fact hold open mesothelioma claims against the debtor for personal injury, tort or wrongful death, the response rate will be somewhat higher than sixty-eight percent and therefore in our submission will prove to be even more adequate for the legitimate purposes of aggregate estimation.

I have not taken the trouble, Your Honor, in this posture to go through these problems by way of underscoring that there are very significant issues concerning the reasonableness of an effort to corral all of the questionnaire recipients into a compulsory questionnaire compliance process at this stage, given the cumbersomeness of the information, the difficulties that both sides are having in getting their arms squarely around the information at hand, and the apparent robust nature of the responses from our point of view and the vast amount of evidence in the form of attachments that the questionnaire has already called for. We would like to be fully heard on those issues on the 26th before and we hope instead of allowing the word to go out to the world to come in and argue their specific questionnaire issues in front of you on the 26th, or ever, and for that purpose we have submitted a proposed order that would call upon the debtor to promptly

notice the same people served with the motion to compel that their response deadline is suspended pending further order and limiting the scope of the January 26th hearing accordingly.

Thank you, Judge.

THE COURT: Before you start, Mr. Cassada, let me run out and cancel something right quick. I will be back in about two or three minutes.

(Recess from 11:30 a.m. until 11:32 a.m.)

THE COURT: Have a seat. I am sorry for that interruption.

Mr. Cassada.

MR. CASSADA: Thank you, Your Honor.

Your Honor, I want to begin by commenting on the illustrative exhibit that Mr. Swett handed up, and I want to point out that the exhibit is not really a fair representation of the responses.

First, Your Honor, of the total responses, as you heard from Mr. Swett, the three thousand, nine hundred and forty-seven, a substantial number of those include the eight hundred and fifty-four persons that he talked about who the debtors have concluded did not have open mesothelioma claims. So those who responded, a substantial number did so by saying they don't have claims.

And just to remind the court about how that happened, we had moved the court to require that questionnaires only go

to five thousand or so claimants who the debtors believed had open claims because the debtors post-petition had amended their database and it was the committee that insisted that we serve those eight hundred and fifty-four persons, perhaps disputing whether they had claims at all.

So when we look at the total response rate, we see three thousand, nine hundred and forty-seven. A substantial portion, as we understand, of eight hundred and fifty-four are included in that number and then also included in that number are forty percent of those claimants who properly objected, who filed their objections in the proper way required by the court and did not provide information required.

In addition to that, we have a substantial number of claimants as of yet, the number not yet identified but substantial as shown by a review of the committee's personal injury questionnaires, who raised no objections but did not provide information required. So the suggestion that there has been a robust response we believe is completely wrong.

Your Honor, the committee essentially wants the court to excuse objecting and noncomplying questionnaire claimants from having to respond to the debtors' motion to compel compliance so the committee can first argue that objecting claimants should not have to answer the questionnaire in the first instance.

Now this is precisely the litigation that took several

months last fall when the committee argued that the court should hear objections to the questionnaire in two stages. First the committee and the futures representative should have a chance to review the questionnaire and object to it and to be heard on that and that the court should enter an order on those questionnaires. And the committee asked the court to excuse claimants and claimants' law firms from objecting to the questionnaires and require them to raise their objections in the questionnaires when they responded, and the court agreed with that procedure and we did so.

So the committee has already raised its objections to whether the information required in the questionnaire should be required and whether it should be required of the entire class of open mesothelioma claims. The court has heard and ruled on those issues.

The emergency motion violates the March 31 bench ruling where you adopted the two-stage procedure set forth by the committee and the futures representative.

So Your Honor, we are going today to urge the court to deny the motion because it accomplishes nothing more than delay, and we believe the time has come to enforce the questionnaires so we can move forward expeditiously with the case.

First of all, Your Honor, I want to talk about the relief we seek because we seek modest relief at this stage.

First, we want an order compelling claimants who did not return a questionnaire to do so, and we have identified those claimants by claim name and law firm. We have attached them to the motion and we have given notice.

In fact, the motion has in a sense worked the way that you would expect a motion to compel discovery to work. Some law firms have contacted the debtors, and we have removed them from the list because they have demonstrated that they – some of them have demonstrated that they did file a questionnaire and some of them have stated that they did not file a questionnaire because their claimants do not have claims. So that is the way the process is supposed to work and, by filing the motion, we have started that process.

But, in any event, it is going to be necessary for this court to enter an order requiring that one-third or so of the claimants who did not return any questionnaire at all to do so.

Second, Your Honor, we have asked the court to rule on the objections that have been properly raised in the questionnaire. We have likewise identified each of the claimants who properly objected and have given each claimant notice. Now the court ordered in the questionnaire order and in the questionnaire form itself that all objections be set forth on Exhibit 2 to the questionnaire. It specifically said don't attach your objections to the questionnaire. So we have

given notice to all of the claimants who have properly objected, and there may be some objections that are attached and we will certainly deal with those objections, as well, but those objections are identical, in our observation, to the objections that appear on Exhibit 2, and we have served notice of the opportunity for all claimants to come in and to sustain their objection.

Now, third, and finally, Your Honor, we have asked the court to set forth procedures that contain appropriate sanctions that ensure compliance. Now, Mr. Swett calls this sweeping action that is unprecedented and unnecessary, but this is precisely the type of relief that Your Honor held that we should seek in your March 31, 2011, bench ruling and, in doing so, the court adopted the procedure suggested by the committee. Your Honor, we are not picking fights; we are moving forward in the case so that we can get to a resolution.

Mr. Swett talked about how some of the claimants had objected on the basis that they had settlements. Now, there are some claims who said they have settlements. We have no record of the settlement, and these are not claimants who are saying we don't have a claim because we settled with you and resolved our claim a while ago. These are claimants who are saying we have a settlement and you owe us money on the settlement, and we have no record of that. And we have checked our files, we have checked with local counsel. There is no

record of these settlements and, in our motion, we will ask the court to require any claimant in the database who asserts they have a settlement to produce a copy of the basis, to describe the basis for the settlement and produce a copy of a settlement agreement.

Your Honor, in considering the committee's motion today, we believe a short history of the questionnaire order is in order and it will put the committee's motion in the proper perspective.

Your Honor may recall that the questionnaire itself was the product of months of litigation. The committee and the FCR participated in the formulation of the questionnaire and the questionnaire process.

There was one point early on, Your Honor, when the court had indicated that it would follow a different two-stage process and that is to first hear objections from the committee and the futures representative and then, before issuing the questionnaire, it will hear individual objections. So we had individual law firms who were participating.

Now, the committee, in particular, raised numerous objections to the form and content of the questionnaire. In the first place, the committee opposed the questionnaire altogether and the committee argued that the information sought was unnecessary and exceeded the appropriate scope of the committee's vision of a proper aggregate estimation proceeding,

precisely the argument that you heard Mr. Swett say he wants to make later this month.

Now, on June 21, the court approved the questionnaire. The court disagreed and overruled the committee's objections, at least as they related to the final information required in the questionnaire. The court granted some of the committee's objections and denied our request to require claimants to provide certain other information. But the questionnaire that was approved reflects the court's rulings on the committee's objections.

Now prior to the June 21 approval, there was a dispute over when claimants would have to lodge their objections. Remember that the debtors served a questionnaire motion on all fifty-eight hundred persons with open claims and argued all of their objections should be heard up-front. We argued that this process would allow the process of gathering information to be completed most expeditiously, and this was precisely the procedure followed in the *Bondex* case and, as the court knows, the *Bondex* questionnaire was approved after Judge Fitzgerald heard and ruled on claimants' objections. And it turned out there was not chaos. There were several law firms who appeared to raise objections for the class of creditors.

The committee and the FCR urged the court to follow a different two-stage process. They wanted the court to excuse individual claimants from participating in the formulation of

the questionnaire and the PIQ process and they moved to order that individual claim objections would be preserved and that claimants would be allowed to raise objections when they returned their questionnaire responses. And the committee argued that the court should hear claimants' objections in, quote, omnibus proceedings after the response deadline.

Now, again, the debtors objected. We argued that the process proposed by the committee would be cumbersome, time-consuming and could lead to litigation chaos.

The committee responded insisting that omnibus procedures after responses was the proper way to proceed and even mentioned that it would cooperate in omnibus proceedings. A quote from the committee's argument:

> "When you seek discovery from five thousand, five hundred people at the level that the debtor is seeking, there are going to be problems of compliance and we are just going to have to deal with them, but there should be no fear about that. Courts are, by now, quite used to omnibus procedures or orchestrating concerted resolutions of sets of objections like that, and we can certainly cooperate in some process like that here."

And the committee accused the debtors of fear mongering by suggesting that the committee's proposed procedure of delaying consideration of objections to subsequent omnibus

procedures could leave to chaos and delay. And, in particular, the committee said we can deal in due course with whatever problems turn out to be and I think it is a little bit of crying wolf to suggest that it is going to be a meltdown.

Now, that is a familiar word because the last time we were here, the committee suggested that Garlock seeking to compel compliance was going to lead to a, quote, litigation meltdown.

Now, the court at the end of the day was convinced by the committee's argument to postpone consideration of claimants' objections until after they responded to the questionnaire, and the court recognized that objections were inevitable but you ruled, as proposed by the committee and the FCR, that you were going to follow the two-part process and that it was appropriate. First, you would resolve the questionnaire among the debtors, the committee and the FCR, ruling on any objections that the committee and FCR had to the form and content of the questionnaire proposed by the debtor.

Second, you ruled that claimants could object later in their responses and that you would rule on such objections at that time after giving claimants an opportunity to be heard.

Your Honor may recall that you opined that you had the power to fashion remedies to ensure compliance. Specifically you stated:

"It may be as simple as just valuing those claims at

zero or maybe some aggressive type of orders contemplated by something like Rule 37 in order to try to get compliance and, if we have absolute anarchy break out, then we will deal with that as best we can but I think we will not try to anticipate anarchy at this point and hope for the best."

Thereafter, Your Honor, the court entertained and ruled on the first stage objections raised by the committee and FCR and approved the questionnaire in its current form.

Now, those objections included, we suspect, although the committee hasn't actually given its reasons why the court shouldn't hold the omnibus objection proceedings that it suggested last spring, we believe, based on hints in a more recent motion that they filed and what they said before, they are going to raise the same arguments that they did, that it is going to be time-consuming, it is going to be expensive, it is going to lead to a meltdown, it is going to be disputatious. I think that's another word we have heard. So we are going to rehash everything that we have already been through.

Your Honor, as it turned out, the Garlock questionnaire looked almost identical to the *Bondex* questionnaire where the same law firms appeared and where claimants objected up-front and where the court heard and ruled on those objections.

So the current situation is that the questionnaire

response date has now passed and, as everyone predicted, we have numerous objections and, by our motion, we request that the court, under procedures proposed by the committee and contemplated by your previous order, proceed to the second stage of the committee's two-stage process and hear and rule on claimants' objections and set forth a procedure for enforcing compliance. Nothing has changed.

But now the committee objects to its own two-stage procedure and it wishes to introduce a third stage. It wants to delay the second stage while it argues for a second time that objecting creditors should not have to respond to the approved questionnaire in the first instance. Again, we have already heard those arguments.

This emergency relief, it will accomplish nothing but delay, to give the committee a second bite at the apple, and none of the reasons that we have heard it offer – we really haven't heard much – has any merit. Again, most of it has already been heard.

First, the argument that the questionnaire seeks information that exceeds the appropriate scope of aggregate estimation proceeding, the court already ruled on this point and required every questionnaire claimant, not a sample, particularly not a sample chosen by the law firms, to complete and return the approved questionnaire.

Second, the committee argues that compelling

compliance by claimants who object is unnecessary because the information the debtors receive from claimants who did not object provides more than sufficient information to estimate the allowed amounts of all disputed claims. This is wrong for at least two reasons.

First, it is inconceivable that a representative sample can be created by permitting plaintiffs' law firms to decide which claimants opt into the questionnaire process and which opt out. If the questionnaire claimants and the committee have the right to control the evidence upon which estimation is based, the whole process will lack legitimacy. Compliance with your questionnaire order provides the only way to generate a fair body of data for estimating the allowed amounts of claims.

To try to project the facts from the claimants who responded onto those who did not cannot be done. Indeed, the only proper inference is that those claimants who did not respond or refused to provide information lack allowed claims. Mr. Swett has as much as admitted that today, suggesting that we should just assume that people who didn't return questionnaires don't have claims that would be paid. And enforcing the questionnaire, our way at least gives these claimants a second chance to provide information before that inference is drawn.

Second, for the committee to prove that the debtors

have enough information, there would have to be an analysis of the questionnaires, expert testimony and satellite litigation to determine that the body of information is representative. Particularly in the face of the commonsense conclusion that it's not, that makes no sense at all. Such a determination would take months, if not a year or more, to complete.

The court has already ordered all questionnaire claimants to complete the questionnaire and the fact that some law firms, including most of the committee, chose to object has no basis – it's no basis to start a new litigation to determine whether to amend the questionnaire order to excuse objecting claimants from compliance. That's exactly what the committee wants to do.

The committee complains that the debtors have not identified which claimants raise objections but that's not true. We have been very specific in the exhibits. Now the committee points to examples where there may be inaccuracy in those exhibits and the process that we have begun will work, we think, efficiently and reliably to identify which claimants have actually returned questionnaires contrary to what we have said and which ones have certified. And certainly at the end of the day, Your Honor, we are not going to ask the court to disallow any claimant who has actually complied with the court's previous orders.

Exhibit 2 lists each claimant who didn't return a

questionnaire. Exhibit 3 lists each claimant who objected and identifies the portion of the questionnaire to which each claimant objected. And, as the court said earlier, there will be omnibus proceedings to rule on objections. That has to take place and it should take place now.

Finally, the committee has hinted that the omnibus procedures it proposed last year will result in a litigation meltdown. That's what we heard the last time. This is just the opposite of what the committee argued when they argued that the court should adopt a two-stage process. Again, the committee acknowledged that, quote:

> "There will be problems of compliance and we are just going to have to deal with them but there should be no fear about that. The courts are by now used to omnibus procedures or orchestrating concerted resolutions."

And the court says and we certainly – and we can certainly cooperate in some process like that here.

So, Your Honor, the emergency motion should be denied. The fact that there might be some claimants who are listed on these schedules who are amended later is no reason to delay the process of ruling on objections and completing the questionnaire process.

The court has already heard the committee's objections to the questionnaire. The motion that we filed is not even

directed to the committee. The committee has no ability to bind the claimants. It is time for the committee to do what it said it would do and to recommend compliance with the constituents and for this court to hear the claimants' objections so we can advance the case toward resolution.

MR. SWETT: If I may briefly, Your Honor. The committee is playing out its statutory role, which is a constructive one in the case. We haven't, in fact, proselytized among the constituents. We have done our best to make this questionnaire process, although our objections to it were overruled, a constructive one. And now we are attempting to play the same role with respect to the issue of what, if any, compliance procedures should be undertaken, what the timing of that should be and what the scope is.

No one is surprised by the fact that there are objections. Of course the debtor has objected to virtually every discovery request we have made of them throughout this entire case, but we have not moved on anything like substantially all of those objections because that's not the way constructive litigators work.

We have engaged in elaborate meet-and-confer processes with them to try and narrow issues and, even where they have stuck to their guns and not seen things our way, we haven't brought you every dispute. We tried to work around them because otherwise we would spend all of our time haggling over

discovery motions and you would be bogged down, too, and we just don't think that's the way to go about it, and we are just bringing that same philosophy to bear now from our committee perspective on what makes sense from the standpoint of administering this case.

Now, we are not saying now there should never be any compliance measures taken with regard to the questionnaire. We don't know. What we do know is that it is inappropriate to send out a blunderbuss to the entire set of people listed on the debtors' attachments, which we have already demonstrated include a very high error rate, to inflict costs and time burdens on those law firms whose main job in life is representing sick and dying people to recover funds from solvent defendants. It is highly disruptive of their practices and it doesn't serve the legitimate purposes of this case to fire off a blunderbuss like that.

They now acknowledge that a process of informal consultation with law firms has been constructive, but they seem to think the onus is on the recipients of the questionnaire to come to them and reach out to them and explain their position and why they shouldn't be on the debtors' list. They can as easily pick up the telephone. They are used to that. They require us to do that, and they shouldn't move under the local procedures until they have the meet-and-confers and have narrowed the issues and gleaned as much as they can by

way of satisfactory responses from that informal process without burdening the court or the estate with litigation.

They say that individual claimants participated in or through their counsel in the design of the questionnaire. That's misleading. Law firms associated with the committee, not all but some, in their capacity as fiduciaries consulted about that matter. That's different than what happened in *Bondex* when law firms appeared because the case took a different direction, and I would argue that this one has been a lot more efficient and a lot more productive than the *Bondex* process, as witness the fact they got started a whole lot sooner than we and we got our questionnaire responses in at about the same time, and we are a lot further along toward aggregate estimation by my likes than they are.

So there have been benefits to this process although it involves the committee and the debtors disagreeing and bumping heads. Hopefully the results are a more productive, efficient process, helpful to the court's task of estimating the aggregate.

Our main point now is this motion is ill-designed for the purposes of the questionnaire and of the aggregate estimation. We have profound differences with them. You may rule for them; you may rule for us; but there are things you ought to consider here and rule on before you allow that motion to compel to go out and cause a lot of Sturm und Drang among

the constituency.

I am sorry the debtor regards our efforts as somehow inconsistent with our past arguments. I don't think they are. We are continuing to try to play the role that we have played from the outset, trying to bring to bear our perspective of what makes sense. We don't think their motion to compel makes sense.

I should add that I don't think there's a chance in the world that, if we had two hundred individual law firms in this courtroom on the 26th, that any of them would actually be heard that day because we have all of those other important case administration motions to get through and because the debtor isn't receiving under their own schedule the written submissions of those law firms until the 23rd. It hasn't particularized its attack on any of their objections. It has just said you all come in here and submit a brief on your objections and we will answer later. It has given itself three days. There is no way it will brief those matters in any sensible fashion in that period of time.

I think what happened is they lamented, regretted the tact they took in the bar date motion and tried to see if they could somehow leapfrog over that. It won't work. It's not a sensible approach, and we hope that you will enter the order we have submitted.

MR. GUY: Your Honor, it's Jonathan Guy for the FCR.

May I be heard quickly if Mr. Swett is finished?

THE COURT: Yes.

MR. GUY: Your Honor, I will be very brief. The issue is not whether the motion to compel should be granted. It's simply whether the individuals have to respond first or whether the ACC can respond and the court can hear those arguments. We believe that the motion should be granted.

The debtor has sought discovery of what is now thousands of meso claimants. It is efficient to have the committee respond. It is going to be incredibly cumbersome to have hundreds of claimants in court. I don't think the debtors are even ready to respond to those individuals if they do.

To the extent the court hears these issues when they are teed up by the debtors and by the ACC, it is going to narrow issues. It is going to save costs for everybody. There is evidence with regard to the questionnaire in the first instance, the court ordered relief that the debtors sought without the individuals having to appear, and I think the same thing will happen this time around.

And in light of the various missteps that we have seen with regard to the analysis of the questionnaire data, it seems premature to require the individuals to respond. And I agree with Mr. Swett, it is practically impossible to consider individual objections given that everything is set for the calendar on the 26th.

Thank you, Your Honor.

THE COURT: All right. Well, I think we ought to have a third-stage, if you want to call it that. So I think what we will do on the 26th is hear the motion, along with the committee's objections, and I will determine what issues I can based on that.

I will not overrule any individual's objections without giving them a chance to be specifically heard, but there may be some or all the relief that can be dealt with and perhaps narrow the impact and narrow the scope of where we go after that, and that we can do that with a separate setting if that is necessary for that.

I think the order that the committee attached that I read seemed to do that without going any further. So I would suggest that we just enter that order, and I think that requires – I guess the debtor has the mailing list but to notify people that they won't need to be here on the 26th. You will need to do that, I think.

We can, on that date, if there are further hearings necessary, can set a date and time for those hearings to take place. Okay.

MR. SWETT: Thank you, Your Honor.

MR. CASSADA: Your Honor, could I have an opportunity to look at the order?

THE COURT: Yes. Look at that and, if you have serious

problems with it, let me know and we can deal with that on the telephone. Okay.

Thank you all, and we will see you Thursday.

MR. SWETT: Thank you, Judge. Should I collect the exhibits?

MR. GUY: Thank you, Your Honor.

THE COURT: Do you need the exhibits?

COURTROOM DEPUTY: No, because they were not admitted. They were just identified.

THE COURT: Well, I will admit them if you want. They ought to just be part of the record.

Thank you all.

(Off the record at 12:02 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Patricia Basham

Patricia Basham, Transcriber

Date: January 12, 2012